

AN ANALYSIS OF CRIMINAL LIABILITY OF COMPANIES UNDER INDIAN LAW

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ABSTRACT

Companies have now become a dominating figure in the economic, political legal and social world. The growth of companies has been increasing at a tremendous rate and thus the urgent need for regulation of companies has also increased. The principle of companies being a separate legal entity is now widely recognized around the world. In India, there are two types of corporate criminal liability: organisational and derivative. Vicarious liability and the identification doctrine are parts of the derivative model. The corporate culture that aids in the commission of a crime is the focal point of the organisational model. Employees are subject to corporate criminal culpability if they do not act in the course and for the advantage of the company. The question of whether a company can be indicted of any criminal offence has repeatedly arisen in courts in India. The courts initially believed that a company cannot be charged under any crime but have since changed their outlook. However, there are still areas where Company law has not been able to regulate companies and may be required to do so in the near future. Though a few laws have been enacted to hold companies accountable for crimes, many grey areas are arising which require legislation.

INTRODUCTION

After the Industrial Revolution, the world saw a staggering growth rate in businesses and companies. Though this is mainly attributed to the rapid expansion of technology across the globe, it drastically affected how businesses were run around the world. There was a sudden increase in capitalism and how these newly formed companies would exploit not just individualistic beings but society as a whole. This was a time when regulation was needed on these companies.

Today, the scene is different. The world has changed since the industrial revolution and companies, though now heavily regulated still dominate the financial, economic, political, and social world at large.

Today's legal world views a company not just as a summation of its members but as a separate legal person.

The definition of the term company is not given in detailed explanation when it comes to the Companies Act of 2013 as well as the Companies Act of 1956. Section 3 (1) (i) of the Companies Act, 1956 defines a company as “a company formed and registered under this Act or an existing company”ⁱ. Section 3(1) (ii) Of the act states that “an existing company means a company formed and registered under any of the previous companies’ laws”. Section 2(20) of the Companies Act 2013 defines a company as a “company incorporated under this Act or under any previous company law.”

Lord Justice Lindley has defined a company as “an association of many persons who contribute money or money's worth to common stock and employ it in some trade or business and who share the profit and loss arising therefrom. The common stock so contributed is denoted in money and is the capital of the company.”

Thus, a company is a registered association that is an artificial legal person with limited liability, a common seal for signatures, a common capital made up of transferable shares, and an autonomous legal entity with perpetual succession.

SEPARATE LEGAL ENTITY

Courts have observed the concept of companies being separate legal entities in many cases. The landmark case of **Solomon V. Solomon**ⁱⁱ, The House of Lords, upon appeal, unanimously held that, as the company was duly incorporated, it is an independent person with its rights and liabilities appropriate to itself, and that “the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are”.

Companies being a separate legal entity was recognized in India even before Solomon’s case. This was in the case of **The Kondoli Tea Co. Ld.**ⁱⁱⁱ Here the Court observed that “The Company was a separate person, a separate body altogether from the shareholders and the transfer was as much a conveyance, a transfer of property as if the shareholder had been a totally different person.”

The consequence of a separate legal entity is that the firm is independent of its owner. The most important defence is that the company, not the owner, shareholders, or directors, is nevertheless responsible for any offence. The business has to be held accountable for the crime it committed. The founders of the company are exclusively responsible for the level of involvement they have in it. This suggests that the company's stockholders are not totally responsible for any business debts and that lenders cannot seize their property to pay off debts.

CRIMINAL LIABILITY OF A COMPANY

It seems to be universally accepted that a company is separable from its members. Thus, the company is generally separately liable for the acts of its members. If the founder of a company dies, the company can live on. If a member commits any act which he is personally liable for, it needn’t affect the rest of the company.

Traditionally, it was believed that a company or a corporation cannot be held to be criminally liable due to the fact that a crime required 2 elements – a guilty mind (Mens Rea) and a guilty act (actus reus) and though actions were easy to prove, the question arose over how a company could have any guilty intention considering it was a non-living entity.

The question whether a company can be criminally liable arises and to what extent it is liable. In the case of **Gopal Khaitan v. State**^{iv} courts have stated that a corporation can be held liable for mens rea. Further, Section 2 of the Indian Penal Code (IPC) states that “Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within India.”^v Section 11 of the Indian Penal Code defines the term person. It states “The word “person” includes any Company or Association or body of persons, whether incorporated or not.”

Theories of Criminal Liability

In India, two models of Criminal Liability exist when it comes to companies^{vi}. These are as follows-

Derivative Model: An organization's liability is a derived liability. A person associated with or hired by an organization and committing wrongdoing gives rise to the corporation's liability. Due to the individual's relationship with the organization, the organisation is made liable. This is further divided into two categories, namely

- 1) *Vicarious Liability:* The doctrine of vicarious liability is generally used when referring to a tort or a civil wrong. The idea of vicarious culpability is founded on two latin maxims: Qui facit per alium facit per se, which suggest that ‘one who acts via another is considered to have acted alone’ and ‘respondeat superior’ which means ‘let the master answer.’ In the case of **S.M.S. Pharmaceuticals Ltd. v. Neeta Bhalla**^{vii}, the SC determined that liability does not result from merely holding a position of authority or office within a company, but rather from being in charge of and accountable for the company's business operations at the relevant time the offence was committed.
- 2) *Identification Doctrine:* As mentioned earlier, the difficulty in proving a company’s liability in criminal acts was that it was difficult to ascertain “men’s rea” or a guilty mind of a company. The identification doctrine states that the actions and mental stages of the corporation that are present in the action stages of the employees or directors are to be taken into account when determining the actions and mental stages of the corporation as a whole. In **Tesco Supermarkets Ltd v. Natrass**^{viii}, Lord Reid said: “The person who acts is not speaking or acting for the company.

He is acting as the company and his mind, which directs his acts, is the mind of the company. If it is a guilty mind then that guilt is the guilt of the company.” The same principal was agreed upon in the cases of **Lennard's Carrying Company Ltd.**^{ix} v. Asiatic Petroleum Co. Ltd and the case of **R v ICR Haulage Ltd.**^x

Organizational Model: The organizational model was once again propounded to answer the question of how a company can have a guilty mind. It now, however, emphasized on how the corporation’s ecosystem functions. The corporate culture may facilitate the commission of a crime requiring a mental state by, first, providing the conditions or necessary encouragement so that the employee who committed the crime felt it was perfectly acceptable to do so, or by psychologically supporting the commission of the crime. Second, it's possible that the corporate culture contributed to the fostering of a criminal environment. In both cases, the company and its workplace culture were to blame for the offence.

The following requirements must be followed for establishing corporate criminal liability:

- **Acting within the scope of employment:** First and foremost, the employee committing the crime must be functioning within the parameters of his employment, that is, he must be carrying out tasks that his parent firm has given him permission to do.
- **Benefit to the corporation:** The agent's actions must in some manner be advantageous to the business. The illegal act must not be in conflict with the interests of the corporation, even though the corporation need not really directly obtain the benefits or fully enjoy them.

CORPORATE CRIMINAL LIABILITY IN INDIA

Initially, courts in India were reluctant to opine on the criminal aspect of companies due to certain problems that arose. For instance, In the case of **M.V. Javali vs. Mahajan Borewell & Co. and Others**^{xi}, the company was found to be in violation of Section 276B read with Section 278B of the Income Tax Act, which mandates a mandatory sentence of at least three months in prison. However, the court was unsure of how to actually imprison the company. Additionally, in the case of **Zee tele films ltd. v. Sahara India Co. Ltd**^{xiii}, The court dismissed the complaint

of defamation holding that mens rea is one of the essential elements of an offense of criminal defamation and that the company could not have the requisite mens rea. In the case of **Assistant Commissioner v. Velliappa Textiles Ltd.**^{xiii}, a larger part of the court ruled that an organisation cannot be charged with crimes that carry a mandatory jail sentence and a fine. The court cannot simply impose a fine.

Many cases arose where the court could not opine on criminal liability of a company. The courts, however, overruled their decision in the landmark case of **Standard Chartered Bank v. Directorate of Enforcement**^{xiv}. In this case, the court overruled their previous views on the criminal liability of a company and held that just because the charges against the firms involve offences for which obligatory prison time is the prescribed punishment does not grant them protection from prosecution. The court cannot condemn the company to imprisonment; thus it cannot get that punishment. However, if imprisonment and a fine are the appropriate punishments, the court may impose a fine that might be applied to the firm.

Once this was established, courts clearly recognized the criminal liability of a company. In the case of **Iridium India Telecom Ltd. v. Motorola Inc.**^{xv}, According to the Supreme Court, a corporate entity can be charged with conspiracy and cheating under the Indian Penal Code. By saying that corporations and corporate houses can no longer seek immunity from prosecution on the grounds that they lack the mens rea required to commit crimes, it permitted the prosecution to continue.

Another means by which the judiciary could tackle corporations was through the 'Alter Ego' doctrine. The doctrine essentially does not allow shareholders of the company to hide behind the company. The Corporation is regarded as the person's other self. As a result, the business may be held accountable for any criminal activity that an employee does while doing his duties. The corporate mens rea is seen as the mens rea of the individual.

CRIMINAL LIABILITY OF COMPANIES IN OTHER FIELDS

Generally speaking, the Companies Act, 2013 provides for certain provisions in which a company may be liable for any criminal acts. However, there are certain upcoming fields and areas in which legislation has not been enacted yet. Some of the following fields are;

- *Artificial Intelligence*: On 9th December 1981, there was a major turning point in the evolution of technology. In Western Japan, a worker was attempting to repair a robot in a factory when the robot caused the death of the worker. This was the first recorded case of a death caused by a machine.^{xvi}

Nearly four decades later, Artificial Intelligence has grown to an extraordinary extent. However, with it comes major possible ramifications, particularly in the legal world. Companies now use Artificial Intelligence to carry out most of the tasks within an organization. The reasoning behind this is that a machine can work faster, smarter and for longer as compared to a human being. A machine today is essentially a human being with greater of our strengths and fewer of our weaknesses. Companies like Tesla and Amazon have been among the forerunners when it comes to AI, but with a completely free field to play on. Today in India, no laws have been enacted on Artificial Intelligence. The first and most prominent question that arises is whether a company is liable for any act that a machine commits or whether the machine itself may be liable. Further many companies employ machines from other companies, further expanding the possible liability that may arise. Gabriel Hallevy proposed a three-fold model on how Artificial Intelligence can be liable for any crime committed.^{xvii} The model is as follows:

- *The Perpetration-by-Another Liability Model*: In the famous M'Naghten case^{xviii}, it was decided that a person cannot be found guilty of a crime if they did not realise the nature of the conduct they performed or what effects it might have. This is in line with a well-established rule of criminal law known as 'actus non facit reum nisi mens sit rea,' which states that an act is not unlawful unless a guilty mind also does it. In this concept, the person giving the AI system instructions is viewed as the culprit while the AI system is treated as an innocent agent.

- The Natural Probable Consequence Liability Model: According to this concept, an AI user or programmer is held accountable for an offence the AI commits that any reasonable user or programmer should have seen coming as a natural and likely result of their actions and should have averted by taking the required precautions. First, if an AI commits an offence due to careless use or programming, it will not be held accountable. However, if it acts independently of human control or in a manner that deviates from its programming, it will be held accountable. This model however, assumes that AI is simple and follows particular directions given by its programmer. In the modern world, this rule may even be considered outdated.
- The Direct Liability Model: This model includes every action an AI takes that is independent of the programmer or the user. In strict liability situations, when mens rea need not be established, the AI will be held entirely accountable. However, the issue with this is that it is difficult to prove when AI commits any act.

Certain fields are now almost entirely taken over by artificial intelligence. There are moral and ethical dilemmas on how these can be regulated. For instance, in the near future we could see companies using driverless cars as a taxi service. In a scenario where the driverless car commits a crime, the question arises as to who is liable. It is also entirely possible that the aviation sector will also be mostly controlled by machines.

- *Social Media*: It is said that over half the world's population uses social media. There is currently very little regulation on social media and the role it plays in society. According to several studies, increased use of social media is heavily linked to an increase in anxiety, depression, and other mental disorders. The general consensus today is that social media is seen as a positive for efficient communication between people but the effect it has on psychology is drastic. Additionally, social media has also become a hub to spread hate speech and disinformation among parties. As of today, the corporations are not being held liable for any acts in India.

India is now one of the few countries that do not have a set of privacy laws relating to social media. **Justice K.S. Puttaswamy v. Union of India**^{xix} and other linked matters was heard by a nine-judge Supreme Court bench on August 24, 2017, and the majority

decision affirmed that every Indian has a constitutional right to privacy. However, with social media subconsciously collecting most of the data on individuals' personal lives, it is still impossible to say what data is being preserved and what isn't.

- *Cryptocurrency*: Until recently, very little importance has been given to the use of cryptocurrency in India. The primary issue with cryptocurrency is that without any regulation, companies may use digital currencies to launder finances from one state to another.

CONCLUSION

Companies are now dominating most of the economic world. India has made a comprehensive framework of laws in the Companies Act of 2013 which has now dealt with the criminal liability of a company. It is held that a company can be held liable for any criminal acts that occur and though the judiciary was initially reluctant to indict companies, they have now agreed to do so. There are also many fields where companies are yet to be regulated which could lead to drastic consequences in the near future of not reviewed and scrutinized by legislators.

ENDNOTES

ⁱ The Companies Act, 1956, § 3.

ⁱⁱ *Salomon v. A Salomon & Co Ltd* [1896] UKHL 1, [1897] AC 22.

ⁱⁱⁱ *Re: The Kondoli Tea Co. Ltd.* (1886) ILR 13 Cal. 43.

^{iv} *Gopal Khaitan And Ors. v. The State And Ors.*, AIR 1969.

^v The Indian Penal Code, 1960, § 2.

^{vi} Antim Amlan, *Corporate Criminal Liability in India*, last seen on 20/2/23, <https://www.myadvo.in/blog/corporate-criminal-liability-in-india/>.

^{vii} *S.M.S. Pharmaceuticals Ltd v. Neeta Bhalla & Anr*, AIR 2005 SC 3512.

^{viii} *Tesco Supermarkets Ltd. v. Nattrass* [1971] UKHL 1.

^{ix} *Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705.

^x *Regina v ICR Haulage Ltd*: KBD 1944.

^{xi} *M.V. Javali v. Mahajan Borewell & Co. & Ors.*, (1997) 8 SCC 72.

^{xii} *Zee Telefilms Limited v. M/S. Sahara India Commercial*, CALLT 262 HC

^{xiii} *The Assistant Commissioner v. M/S. Velliappa Textiles Ltd. & Anr.*, (2003) 11 SCC 405.

^{xiv} *Standard Chartered Bank v. Directorate of Enforcement*, (2005) 4 SCC 530.

^{xv} *Iridium India Telecom Ltd. v. Motorola Inc.*, SCC 74.

^{xvi} Robert Whyman, *Robot kills factory worker*, *The Guardian* (9/12/2014), <https://www.theguardian.com/the-guardian/2014/dec/09/robot-kills-factory-worker>.

^{xvii} Hallevy, Prof. Gabriel, The Basic Models of Criminal Liability of AI Systems and Outer Circles (June 11, 2019).

^{xviii} R v M'naughten 843 10 C & F 200.

^{xix} Justice K.S. Puttaswamy and Anr. vs. Union of India (UOI) and Ors. (2019) 1 SCC 1.

